State v. Korum (Jacob Melvin)

No. 75491-8

MADSEN, J. (dissenting)—In 1998, Jacob Korum was sentenced to 11 years in prison on two charges related to home invasion robberies. Two years later, after Korum successfully withdrew his unconstitutional plea, the Pierce County prosecutor charged 32 counts and, following a jury trial, recommended that Korum be sentenced to over 117 years in prison.

The majority's conclusion that a presumption of prosecutorial vindictiveness does not arise in this case is erroneous for several reasons. First, the majority believes that provisions within RCW 9.94A.411 (formerly RCW 9.94A.440 (1996)), addressing prosecutorial discretion in charging, supports the State's decision to charge 32 counts, 15 of which were added after Korum withdrew his invalid guilty plea. However, the majority misreads that statute when it concludes that the prosecutor was mandated to file all but one of the charges.

Second, the majority places more weight on the value of plea negotiations

than it does on the defendant's right to be free of prosecutorial retaliation for exercising constitutional rights. This is particularly troubling because the inquiry in a claim of prosecutorial vindictiveness is whether the prosecutor filed charges in retaliation for the defendant's exercise of a constitutional right.

Third, the majority mistakenly suggests that additional charges are not vindictive if they are supported by probable cause. However, a charge cannot be filed unless it is supported by probable cause; the fact that the charge is supported by probable cause does not resolve the question of prosecutorial vindictiveness.

Fourth, the majority surprisingly and incorrectly states that factual circumstances resulting from a prosecutor's decision to file additional charges are not facts that can be considered in deciding whether a presumption of prosecutorial vindictiveness arises. Additionally, to reach its result the majority examines discrete facts and then concludes as to each fact that it does not show vindictiveness. This reasoning disregards the principle that whether a presumption of prosecutorial vindictiveness arises depends upon whether all of the circumstances, taken together, show a realistic likelihood of prosecutorial vindictiveness. I would hold that under all of the facts of this case a presumption of prosecutorial vindictiveness arose when the prosecutor filed additional counts after Mr. Korum exercised his constitutional right to withdraw his plea of guilty because it was not knowing, intelligent, and voluntary.

The majority is also incorrect when it concludes that CrR 8.3(b) does not

require dismissal of charges if a defendant is unable to establish prosecutorial vindictiveness. Unfortunately, the majority equates prosecutorial vindictiveness and prosecutorial misconduct under CrR 8.3(b). It finds that Mr. Korum failed to establish a presumption of prosecutorial vindictiveness and therefore he also failed to prove arbitrary action or misconduct required for dismissal under the criminal rule, erroneously conflating two distinct questions.

Finally, the majority mistakenly holds that Korum opened the door to evidence of his prior withdrawn plea, an error under ER 410. It was the State, not Korum, which created the error. For these reasons, I respectfully dissent.

ANALYSIS

Prosecutorial Vindictiveness

In deciding that the prosecutor's conduct in this case gives rise to a presumption of vindictiveness, the Court of Appeals began its analysis with chapter 9.94A RCW, addressing prosecutor discretion. That statute provides, in relevant part, that "[t]he prosecutor should not overcharge to obtain a guilty plea" and "[o]vercharging includes . . . [c]harging a higher degree . . . [and c]harging additional counts." RCW 9.94A.411(2)(a)(ii).

Rejecting the Court of Appeals' analysis, the majority here relies on RCW 9.94A.411(2) (formerly RCW 9.94A.440(2)) to hold that a prosecuting attorney has an obligation to charge all crimes against persons if sufficient evidence exists to bring the charges. Majority at 10-11. The majority reasons that all of the

charges against Korum, with the exception of an unlawful possession charge, were crimes against persons and thus had to be filed. Majority at 10-11. The majority concludes that the Court of Appeals erred in concluding that prosecutorial charging discretion is limited. *Id*.

To reach its conclusion, the majority relies on language in RCW 9.94A.411(2)(a) that says "'[c]rimes against persons *will* be filed if sufficient admissible evidence exists.'" Majority at 10 (quoting former RCW 9.94A.440(2)). The majority reasons that this is mandatory language overriding limitations in RCW 9.94A.411(2) on prosecutorial discretion, i.e., the statutory language relied on by the Court of Appeals directing that a prosecutor should not overcharge to obtain a guilty plea, with overcharging defined to include charging additional counts. *See State v. Korum*, 120 Wn. App. 686, 701-02, 86 P.3d 166 (2004).[1]

However, it is clear that the legislature did not mean by the use of the words "will be filed" that crimes against persons are crimes that must be charged without regard to the limitations in RCW 9.94A.411(2)(a)(ii) quoted above. The legislature used the very same words "will be filed" in the statute with respect to

[1] RCW 9.94A.411 recodifies former RCW 9.94A.440(2), the statute addressed by the Court of Appeals and cited by the majority. The relevant language is substantively unchanged. RCW 9.94A.411(2)(a)(ii) provides that "[t]he prosecutor should not overcharge to obtain a guilty plea. Overcharging includes . . . [c]harging a higher degree . . . [and c]harging additional counts." The provision also states:

> This standard is intended to direct prosecutors to charge those crimes which demonstrate the nature and seriousness of a defendant's criminal conduct, but to decline to charge crimes which are not necessary to such an indication. Crimes which do not merge as a matter of law, but which arise from the same course of conduct, do not all have to be charged.

Id.

crimes against property and all other crimes: "Crimes against property/other crimes *will* be filed . . . ." RCW 9.94A.411(2) (emphasis added).

If the majority's reading of the provision regarding crimes against persons is correct, i.e., that the prosecution must charge all possible crimes against persons, then the same must be true for crimes against property and all other crimes because the same language relied on by the majority also applies to all other offenses. This would, however, leave no crimes subject to the limitations that the legislature explicitly wrote into the statute. Such a result would be nonsensical and clearly not the one intended since it would render part of the statute inoperative. *See State v. Tandecki*, 153 Wn.2d 842, 847, ¶ 11, 109 P.3d 398 (2005) (court does not treat words in a statute as meaningless; no part should be deemed inoperative). Instead, as the Court of Appeals reasoned, the legislature in fact placed limits on the prosecutor's discretion in charging any kind of offense.

More significantly, the majority's flawed analysis of the statute sends a message to prosecutors that the statute requires them to charge all possible offenses against persons. Additionally, because the statutory language "will be filed" actually applies to all offenses, the majority can be understood only as holding that prosecutors must charge <u>all</u> offenses. Thus, although the majority chastises the Court of Appeals on the ground that its conclusion that a presumption of prosecutorial vindictiveness arose in this case would encourage prosecutors to charge all available offenses initially, majority at 23, the majority's explanation of

former RCW 9.94A.440(2), now RCW 9.94A.411(2), mandates the very same thing, contrary to the legislature's clear intent.

Because the majority's reading of RCW 9.94A.411(2) is erroneous, it does not support its conclusion that the Court of Appeals was wrong nor, more importantly, does it support the majority's implication that the prosecutor essentially had no choice but to charge the additional counts after Korum withdrew his guilty plea. And RCW 9.94A.411 does not support the majority's conclusion that the filing of additional counts after Mr. Korum withdrew his plea was not vindictive.

Another fundamental flaw in the majority's analysis of prosecutorial vindictiveness is its emphasis on plea negotiations at the expense of the defendant's constitutional rights. The majority equates plea negotiations that fail with a negotiated plea agreement and guilty plea, and says there is no reason to distinguish between a failure to plead guilty and a defendant's decision to withdraw a guilty plea. Majority at 16. However, a plea agreement resulting in a plea of guilty involves much more than uncompleted plea negotiations. A guilty plea constitutes a waiver of significant constitutional rights by a defendant including the right to a jury trial, to confront one's accusers, to remain silent, and to be convicted by proof beyond a reasonable doubt, and accordingly due process requires that a guilty plea be knowing, intelligent, and voluntary. *State v. Walsh*, 143 Wn.2d 1, 7, 17 P.3d 591 (2001) (citing cases). Incomplete plea negotiations

do not involve any such waiver. And a defendant has a constitutional right to withdraw from a negotiated guilty plea if it was unconstitutionally obtained. Here, Korum exercised his constitutional right to withdraw from a negotiated guilty plea that was not knowing, intelligent, and voluntary.

Significantly, by emphasizing the importance of plea negotiations the majority overlooks the central inquiry where prosecutorial vindictiveness is claimed. That inquiry is whether the prosecutor filed additional charges in retaliation for the defendant's exercise of constitutional rights. The question here is not whether Korum upset the plea negotiation process, but whether the prosecutor retaliated against him by filing the additional charges because Korum exercised his right to withdraw an unconstitutional guilty plea. There is no exercise of constitutional rights involved in the pre-plea negotiation process.

It is well established that a defendant is entitled to pursue his or her constitutional or statutory rights free of apprehension that the State will retaliate for the exercise of such rights by substituting a more serious charge or adding charges. *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978); *Blackledge v. Perry*, 417 U.S. 21, 28, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974). Accordingly, the State may not enhance the charges against a defendant in retaliation for the exercise of constitutional or statutory rights. *United States v. Goodwin*, 457 U.S. 368, 372, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982). "To punish a person because he has done what the law plainly allows him to do is a due

process violation of the most basic sort and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" *Bordenkircher*, 434 U.S. at 363 (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 32 n.20, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973) (citation omitted); *see North Carolina v. Pearce*, 395 U.S. 711, 738, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969); *United States v. Falcon*, 347 F.3d 1000, 1004 (7th Cir. 2003); *State v. Bonisisio*, 92 Wn. App. 783, 790-91, 964 P.2d 1222 (1998); *State v. McKenzie*, 31 Wn. App. 450, 452, 642 P.2d 760 (1981). "The broad discretion accorded prosecutors in deciding whom to prosecute is not 'unfettered,' and a decision to prosecute may not be deliberately based upon the exercise of protected . . . rights." *United States v. Adams*, 870 F.2d 1140, 1145 (6th Cir. 1989).

A defendant can establish prosecutorial vindictiveness in two ways. First, the defendant can establish actual vindictiveness. *United States v. Raymer*, 941 F.2d 1031, 1040 (10th Cir. 1991); *see Goodwin*, 457 U.S. at 384; *Bonisisio*, 92 Wn. App. at 791. To establish actual vindictiveness, the defendant must prove through objective evidence that the prosecutor acted to punish the defendant for exercising a constitutional or statutory right. *United States v. Meyer*, 810 F.2d 1242, 1245, *vacated*, 816 F.2d 695, *reinstated*, 824 F.2d 1240 (D.C. Cir. 1987); *see Goodwin*, 457 U.S. at 384. Korum has not established actual vindictiveness.

Second, a defendant may establish a realistic likelihood of vindictiveness

that gives rise to a rebuttable presumption of vindictiveness. *Raymer*, 941 F.2d at 1040; *see Goodwin*, 457 U.S. at 373; *Bonisisio*, 92 Wn. App. at 791. A reasonable likelihood of prosecutorial vindictiveness exists when it is more likely than not the enhanced charges are attributable to vindictiveness on the part of the prosecutor. *United States v. Gary*, 291 F.3d 30, 34 (D.C. Cir. 2002); *see Alabama v. Smith*, 490 U.S. 794, 801, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). If "all of the circumstances, when taken together," *Meyer*, 810 F.2d at 1246, show a realistic likelihood of prosecutorial vindictiveness, and thus give rise to a presumption of vindictiveness, "the government bears the burden of disproving it or justifying the challenged state action," *Bragan v. Poindexter*, 249 F.3d 476, 482 (6th Cir. 2001) (citing *Goodwin*, 457 U.S. at 374 and *United States v. Andrews*, 633 F.2d 449, 456 (6th Cir. 1980)); *see Meyer*, 810 F.2d at 1248; *Bonisisio*, 92 Wn. App. at 791. Thus, contrary to the majority's approach, a court should not separate the strands of the entire series of events and factual circumstances and examine each fact separately, but instead a court should consider all of the facts and circumstances as a whole.

If the prosecution fails to sufficiently justify its decision, the presumption of vindictiveness stands. *Bragan*, 249 F.3d at 482; *Meyer*, 810 F.2d at 1245. If the prosecution meets its burden, then the defendant can show prosecutorial vindictiveness only by establishing actual vindictiveness. *Meyer*, 810 F.2d at 1245.

The State maintains that a presumption of vindictiveness does not arise in the pretrial setting.[2] Some courts agree, but their opinions reflect an overly broad reading of Supreme Court precedent. To the contrary, the United States Supreme Court has not foreclosed the possibility that a presumption of vindictiveness may arise in the pretrial setting. Instead, the Court has rejected the presumption in two pretrial situations. In *Bordenkircher*, the Court held that the presumption does not apply where the prosecutor offers a defendant the opportunity to plead guilty or face the threat of more serious charges, provided that the more serious charges are supported by probable cause, the defendant is fully informed of the conditions of the offer, and the defendant has the choice of accepting or rejecting the offer. *Bordenkircher*, 434 U.S. at 363-64. In *Goodwin*, the Court held that a presumption of vindictiveness does not arise where a defendant refuses to plead guilty to a misdemeanor and instead elects to go to trial, and the prosecution then secures a felony indictment. *Goodwin*, 457 U.S. at 382-84.

In accord with the principles set out in *Goodwin* and *Bordenkircher*, prosecutorial vindictiveness will not be found where the only showing of vindictiveness is the pretrial addition of new charges supported by probable cause, usually where the defendant declines to plead guilty or plea negotiations fail, as the Court of Appeals has concluded in several decisions. *E.g.*, *Bonisisio*, 92 Wn.

[2] The majority correctly notes that although this court once commented that Washington cases "suggest[] that actual vindictiveness is required to invalidate the prosecutor's adversarial decisions made prior to trial," State v. McDowell, 102 Wn.2d 341, 344, 685 P.2d 595 (1984), the court has never analyzed the question.

App. at 790-92; *State v. Lee*, 69 Wn. App. 31, 34-38, 847 P.2d 25 (1993); *State v. Soderholm*, 68 Wn. App. 363, 370-72, 842 P.2d 1039 (1993); *State v. Lass*, 55 Wn. App. 300, 306, 777 P.2d 539 (1989); *State v. Fryer*, 36 Wn. App. 312, 316-17, 673 P.2d 881 (1983); *State v. Johnson,* 33 Wn. App. 534, 536-37, 656 P.2d 1099 (1982). As explained, however, there is a significant difference between cases involving a defendant's exercise of the constitutional right to withdraw a constitutionally defective guilty plea and cases where plea negotiations simply break down because, for example, the defendant chooses to go to trial. Significantly, none of the Court of Appeals' cases cited by the majority involve a claim of retaliation for the exercise of the right to withdraw a constitutionally invalid negotiated guilty plea.

Instead of foreclosing the possibility that prosecutorial vindictiveness may arise in the pretrial setting, as the State urges, the better view is that a court should consider all of the circumstances presented. For example, the District of Columbia Circuit explained in *Meyer* that the Court has not adopted a per se rule that the presumption will never lie in the pretrial setting. *Meyer*, 810 F.2d at 1246. The circuit court explained that "[t]he lesson of *Goodwin* is that proof of a prosecutorial decision to increase charges after a defendant has exercised a legal right does not alone give rise to a presumption in the pretrial context" because it does not, alone, "present a 'realistic likelihood of vindictiveness.'" *Meyer*, 810 F.2d at 1246 (citing *Goodwin*, 457 U.S. at 381-84). However, "when additional

facts combine with this sequence of events to create such a realistic likelihood, a presumption will lie in the pretrial context." *Meyer*, 810 F.2d at 1246. The critical question is whether the defendant has "shown that all of the circumstances, when taken together, support a realistic likelihood of vindictiveness and therefore give rise to a presumption." *Id*.

Other courts similarly recognize that the presumption may arise in the pretrial setting. *See*, *e.g.*, *United States v. Krezdorn*, 718 F.2d 1360, 1364 (5th Cir. 1983) ("[t]he proper solution is not to be found by classifying prosecutorial decisions . . . as being made pre- or post-trial"); *accord United States v. Wells*, 262 F.3d 455, 466-67 (5th Cir. 2001); *United States v. Suarez*, 263 F.3d 468, 479 (6th Cir. 2001) (citing *Andrews*, 633 F.2d at 454) ("prosecutorial vindictiveness can potentially be found in the pre-trial addition of charges following pre-trial assertions of protected rights"); *United States v. Gallegos-Curiel*, 681 F.2d 1164, 1169, 1170 (9th Cir. 1982) (in the "rare case" departures from the initial indictment may give rise to a presumption of vindictiveness); *Raymer*, 941 F.2d at 1040 ("reject[ing] the idea that a presumption of vindictiveness may never arise in the pretrial setting" and instead "look[ing] at the totality of the objective circumstances to decide whether a realistic possibility of vindictive prosecution exists"); *see United States v. Doran*, 882 F.2d 1511, 1520 (10th Cir. 1989); *State v. Tsosie*, 171 Ariz. 683, 703-04, 832 P.2d 700 (Ariz. Ct. App. 1992); *State v. Brule*, 127 N.M. 368, 371-72, 981 P.2d 782 (1999).

A defendant will rarely be able to produce proof of actual vindictiveness, *see Goodwin*, 457 U.S. at 384 n.19, a showing that is "'exceedingly difficult to make,'" *Bragan*, 249 F.3d at 481 (quoting *Meyer*, 810 F.2d at 1245); *see Tsosie* 171 Ariz. at 685. However, the underlying principle is not "the proposition that actual retaliatory motivation must inevitably exist," but instead that "'the fear of such vindictiveness may unconstitutionally deter a defendant's exercise,'" of his or her legal rights, *Blackledge*, 417 U.S. at 28, and the due process violation lies "in the danger that the State might be retaliating against the accused for lawfully" exercising a constitutional or statutory right, *Bordenkircher*, 434 U.S. at 363. And, as the New Mexico Supreme Court fittingly observed, "while all forms of prosecutorial misconduct may impinge to some degree on a defendant's right to due process, prosecutorial vindictiveness constitutes a particularly severe, prejudicial, and repugnant due process violation." *Brule*, 127 N.M. at 370. Applying the presumption in the pretrial context in appropriate circumstances serves to protect the defendant's due process rights from serious misconduct that is rarely susceptible of direct proof.

Accordingly, the question here is whether Korum has shown facts beyond the mere filing of more serious or additional charges following plea negotiation and the "routine" exercise of pretrial rights like those noted in *Goodwin*. More precisely, the question is whether Korum has established that the facts and circumstances of this case show the existence of a realistic likelihood of

prosecutorial vindictiveness.

The majority concludes, however, that unless the defendant proves additional facts, independent from the decision to file additional charges, the filing of additional or more serious charges after the withdrawal from a plea agreement does not give rise to a presumption of vindictiveness. Majority at 18. This conclusion reveals the majority's fundamental misunderstanding of prosecutorial vindictiveness claims. The additional facts that result from or become apparent after the prosecutor's decision to file additional charges may be the very facts that establish vindictiveness. Here, for example, the prosecutor's exceedingly disparate treatment of the codefendants occurred only once the prosecutor charged Korum with 32 counts after he withdrew his plea. That disparate treatment is evidence of vindictiveness against Korum. To repeat, the question is whether the prosecutor is retaliating against the defendant because he or she exercised his or her constitutional rights. While the majority concludes that the presumption does not arise in this case, the facts say otherwise.

Here, Korum and four other men, Michael Bybee, Ethan Durden, Brian Mellick, and Zachary Phillips, carried out a series of home invasions during the summer of 1997. The prosecutor originally charged Korum with sixteen counts in connection with two of the home invasions. In June 1998, the prosecutor initiated plea negotiations with Korum. Among other things, the prosecutor advised Korum that if he did not plead guilty, the State would file an amended information and

charge 16 additional counts based on information about other home invasions obtained during the course of the plea negotiations.

On July 31, 1998, pursuant to a plea agreement, Korum pleaded guilty to one count of first degree kidnapping while armed and one count of second degree possession of a firearm. At sentencing, the State recommended a sentence of 72 months on the kidnapping count, a 60-month firearm enhancement sentence to run consecutively to the kidnapping sentence, and a concurrent 12-month sentence on the firearm possession conviction (11 years). In recommending this sentence the prosecution referred to Korum's minimal participation in the home invasion. At the time, the prosecution was aware of all of the home invasions and in fact had threatened to bring additional charges if Korum did not plead guilty. Thus, the majority incorrectly claims that the additional charges resulted merely from additional investigation occurring during the plea negotiations. Moreover, the majority mistakenly discounts the prosecutor's markedly different characterizations before and after Korum withdrew his plea of Korum's degree of involvement in the crimes.

After Korum successfully moved to withdraw his guilty plea the State filed an amended information charging 32 counts, consisting of the original 16 counts, the count of second-degree possession of a firearm that had been included in the plea bargain, and 15 additional counts arising from home invasions occurring prior to August 30, 1997. Following his convictions on 30 of the counts, the prosecutor

asked for an exceptional sentence upward. When asked by the sentencing court why as a practical reason the State sought exceptional sentences when they would not increase the period of actual incarceration, the prosecuting attorney responded that he could not anticipate what would happen later. Report of Proceedings (RP) at 2326. Korum received a sentence of 608 months on the crimes, with firearm enhancements adding 600 months to the period of confinement, for a total of 1208 months.

It may be reasonable to expect that additional counts will be charged if a defendant withdraws a guilty plea and elects to go to trial. And, as the Court of Appeals observed, a mere difference in the prosecution's sentencing recommendations where the first recommendation follows a plea agreement and the second recommendation follows a trial that includes additional counts is not enough to suggest a realistic likelihood of prosecutorial vindictiveness. *Korum*, 120 Wn. App. at 712-14. However, the Court of Appeals was absolutely correct when it said that "[a]lthough some significant increase in sentence recommendation is to be expected when a defendant rebuffs a plea bargain and puts the State to the risk and expense of a trial, nonetheless, this increase cannot be of a magnitude that suggests" the prosecutor has retaliated against the defendant for exercising the right to withdraw a guilty plea and the right to a jury trial. *Id*. at 714 (footnote omitted). The remarkable difference in the State's pre- and post-trial characterizations of Korum's involvement in connection with the original 16

counts, where the State did not base its addition of new charges or its recommendation for exceptional sentences on any post-plea investigation, in connection with the increased charges and the State's sentencing recommendations, are circumstances that suggest prosecutorial vindictiveness.

The number of counts on which Korum was tried and his sentences are also exceedingly disproportionate to the number of counts to which the other defendants who participated in the home invasions pled guilty and to the codefendants' sentences. Again, I recognize that Korum is not in the same position as his codefendants because he was convicted following a jury trial while they pled guilty. Generally, a defendant who pleads guilty obtains the benefit of a bargain involving reduced charges in exchange for the guilty plea. Predictably, defendants who plead guilty will usually do so on fewer counts and receive a lesser sentence than a defendant who exercises the right to trial by jury and is convicted.

However, the extreme variances here, together with the other circumstances, suggest a reasonable likelihood of vindictiveness. The charges against Korum and his resulting sentences far exceeded that of his codefendants. His sentence was nearly five times that of the codefendant some victims identified as the main actor, Durden, and five times that of the codefendant with the next longest sentence. While it is true that Korum effectively conceded that the sentences on the crimes for which he was convicted are within standard range

sentencing, the fact is that the sentencing situation before the court resulted from the State's decision to nearly double the original charges against Korum after he withdrew his plea. That decision was made after the State had already determined that Korum was a lesser participant than the codefendants in half of the charged crimes, had agreed to the earlier guilty plea by Korum to two counts only, and had entered into plea agreements with the codefendants where the longest period of imprisonment imposed was a fraction of that imposed in Korum's case. [3]

Moreover, as explained, this is not a case where the added charges were "brought simply as the result of failure of the plea bargaining process." *Suarez*, 263 F.3d at 479. The circumstances involve more than the State merely filing additional charges after routine pretrial defense motions during ongoing plea negotiations. Instead, Korum legitimately sought to withdraw his plea agreement after his guilty plea was accepted and he was sentenced, because that plea was not knowing, intelligent, and voluntary since he was not advised of all the sentencing consequences of the plea. In addition, the circumstances here vary from the typical case where plea negotiations fail because the added charges in this case were not "'filed in the routine course of prosecutorial review or as a result of continuing investigation'" during ongoing plea negotiations. *United States v.*

[3] The majority suggests that if the additional charges are supported by probable cause, then adding those charges accounts for the discrepancies in the sentences imposed here for Korum's convictions and those of his codefendants. Majority at 19. But, whether probable cause supports the additional charges is relevant in the sense only that the State cannot charge an offense unless it is supported by probable cause. Thus, the fact that probable cause supports the additional charges certainly does not preclude a finding of prosecutorial vindictiveness.

Gamez-Orduno, 235 F.3d 453, 463 (9th Cir. 2000).

While the prosecutor's stake is not the same here as it would be if retrial were necessary following withdrawal of the plea, I believe the Sixth Circuit appropriately rejected the "argument that the prosecutorial stake in a pretrial setting is always so de minimis that there can never be a 'realistic likelihood of vindictiveness' in a pre-trial setting." *Andrews*, 633 F.2d at 454. Here, the plea negotiations were complete, the guilty plea entered, and the defendant sentenced. The severely disproportionate response to withdrawal of the plea, both in terms of comparison to the original charges against Korum and his sentences following the guilty plea and in terms of comparison to the charges and sentences of Korum's codefendants, gives rise to a realistic likelihood of prosecutorial misconduct, and thus to a presumption of prosecutorial vindictiveness.

Once a defendant shows from the totality of the facts and circumstances that a realistic likelihood of prosecutorial vindictiveness exists, the burden shifts to the State to rebut the presumption. "The standard . . . is an objective one—whether a reasonable person would think there existed a realistic likelihood of vindictiveness" so that the government must then produce an objective explanation for its action. *Andrews*, 633 F.2d at 454, 456. Thus, for example, governmental discovery of previously unknown evidence or previous legal impossibility can justify the government's action. *Andrews*, 633 F.2d at 456 & n.10.

The State has not rebutted the presumption, either before this court or in the trial court proceedings. The State now argues that the Court of Appeals erred only in applying a presumption of prosecutorial vindictiveness and presents no objective explanation for its conduct. The State argued to the trial court that Korum failed to make a prima facie case of vindictiveness, that upon withdrawal of the plea agreement the parties were simply put back in the position they were in prior to the guilty plea, and that the State simply charged all the crimes it knew of when the plea was negotiated. Because the State has failed to rebut the presumption of prosecutorial vindictiveness, it should stand. *Bragan*, 249 F.3d at 482; *Meyer*, 810 F.2d at 1245.

The "ordinary remedy" for prosecutorial vindictiveness is to "bar the augmented charge[s]." *Andrews*, 633 F.2d at 455. Accordingly, this court should affirm the Court of Appeals dismissal of counts 17, 20-22, 24, 26-27 and 30-32. (Counts 18-19 and 25 were the added kidnapping charges dismissed as incidental to the robberies.)[4]

CrR 8.3(b)

[4] The concurrence's statement that my position harms defendants and disregards victims shows a fundamental misunderstanding of the plea bargaining process and the facts of this case. The State, at least as much as the defendant, benefits from plea bargaining. If the State suddenly elected not to plea bargain, the defendant's incentive to waive the constitutional right to jury trial would diminish dramatically and the State would find itself trying hundreds of cases that would otherwise have settled. With scarce State resources, the system would quickly reduce to chaos. Thus, contrary to the concurrence's predictions, the State is unlikely to abandon the plea bargain tool.

As to victims, the concurrence fails to recognize that before Korum withdrew his plea, the State was satisfied that only two charges were necessary to vindicate the ills Korum had visited on these victims. Moreover, at Korum's sentencing, victims of some of the crimes appeared to ask the court to show Korum leniency.

The Court of Appeals remanded to the trial court for a determination of which counts aside from those added after Korum withdrew his plea should be dismissed under CrR 8.3(b) to provide a deterrent to prosecutorial vindictiveness. The majority reverses the Court of Appeals on this point, reasoning that Korum has not established prosecutorial vindictiveness and has not proved arbitrary action or misconduct required for a dismissal under CrR 8.3(b).

It is important not to blur these two separate inquires. CrR 8.3(b) provides that a court "may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect[s] the accused's right to a fair trial." The issue whether dismissal is proper based on prosecutorial vindictiveness is a distinct issue from whether charges should be dismissed under CrR 8.3(b), and a holding that a presumption of prosecutorial vindictiveness has not been established does not foreclose a claim under CrR 8.3(b).

A hypothetical example shows why this is the case. Imagine three codefendants who have engaged in a series of crimes, with each participating equally. The prosecutor engages in plea negotiations with each of the defendants, and makes the threat in each case that all possible counts will be filed if the defendant does not plead guilty. Ultimately, each of the defendants rejects a plea and exercises the right to a trial by jury. One of the three codefendants is represented by counsel who has undertaken to file every conceivable motion at

every conceivable opportunity, making the prosecutor "jump through" every possible "hoop," and has a difficult personality. As to the defendant represented by the "difficult" attorney, and as to that defendant only, the prosecutor carries out the threat to bring all possible counts, with the result being that this defendant faces charges that exceed those of his codefendants many times over.

This defendant is unlikely to prevail on a claim of prosecutorial vindictiveness, because his counsel has filed the routine pretrial motions that inevitably impose some burden on the prosecution. *See Goodwin*, 457 U.S. at 381. However, he has a very good claim under CrR 8.3(b) that the prosecutor has acted arbitrarily as shown by the disparate treatment of the defendant represented by the unpleasant attorney in comparison to the other two defendants and in light of all the circumstances.

Prosecutorial vindictiveness should not be equated with misconduct under CrR 8.3(b). Whether Korum has established prosecutorial vindictiveness is not relevant to the question whether he is entitled to dismissal under CrR 8.3(b), contrary to the majority's suggestion. Instead, the Court of Appeals' remand for consideration of whether charges should be dismissed under CrR 8.3(b) should be reversed solely on the ground that Korum has failed to show arbitrary action or governmental misconduct with respect to the original counts, and thus has failed to establish that he is entitled to dismissal under CrR 8.3(b).

ER 410

Finally, I disagree with the majority's conclusion that the trial court's error under ER 410 in admitting evidence of Korum's withdrawn guilty plea was invited error. Contrary to the majority's characterization of what happened, it was the State, not Korum, which opened the door to the evidence. At trial, the State called Korum's father as a witness. On direct examination, Korum's father testified that he had received death threats against his son. The prosecuting attorney asked if he and his son had discussed whether these threats were related to Korum's involvement in the crimes with which he was charged. Korum's father testified that his son had never discussed the crimes with him until the year before trial, when his son told him that he had been present at the scene of the crime but was present to try to purchase drugs only. The State asked Korum's father several times: "Did he tell you he wasn't involved in the crime?" RP at 1467. "Did he tell you what his involvement was?" *Id*. "Did he deny his involvement in that crime?" RP at 1480. "Has he ever told you anything more than what you have testified about?" RP at 1495. Korum's father repeatedly explained that Korum had said he was present to purchase drugs.

Only after the State opened the door to the inadmissible evidence did defense counsel ask on cross-examination: "Jacob always denied . . . involvement in the robbery, isn't that true . . . ?" RP at 1522. "He always has denied involvement in [the] kidnapping; isn't that true?" *Id.* "Denied involvement in the assault, [the] robbery, the burglary?" *Id.* Each time, Korum's father responded

affirmatively.

Thus, contrary to the majority's conclusion, Korum did not invite the error because he did not set it up. *See In re Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606 (2003); *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997). As Korum argues, it was the State that elicited the testimony from Korum's father that Korum had denied involvement in the crimes and said he was present to purchase drugs only The defense followed up with substantially similar questions resulting in the same response, i.e., that Korum always denied involvement in the crimes. The defense did not "open" any "door" that the State had not already opened, nor did the defense introduce any evidence about the withdrawn plea or related statements.

While I do not agree that Korum invited the ER 410 error, I agree that the error was not reversible error. Reversal is not required unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Here, within reasonable probabilities, the outcome of the trial was not materially affected by admission of the evidence. Among other things, Korum testified that he had been present at two of the home invasions, he said to purchase drugs. He claimed he had not been present at the other home invasions, but admitted he had joked about having been involved in one of them. The jury also heard Korum's father testify that Korum had admitted being present to buy drugs.

The jury heard evidence that Korum had fled to Mexico and met with another of the codefendants, who had escaped being arrested. The jury also heard from witnesses and victims who identified Korum as having been present at some of the home invasions. Thus, the ER 410 error was harmless.

CONCLUSION

The Court of Appeals' determination that a presumption of prosecutorial misconduct arose in this case should be affirmed, and, because the State has failed to rebut the presumption, dismissal of the 15 new counts added after Korum withdrew his invalid guilty plea should also be affirmed. Accordingly, I dissent.

AUTHOR:
Justice Barbara A. Madsen

WE CONCUR:

Justice Tom Chambers

Justice Charles W. Johnson

Justice Richard B. Sanders